

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: 1197/20
Applicant: Melinda Sampson
Respondent: Secretary, Department of Education
Date of Determination: 2 July 2020
Citation: [2020] NSWCC 219

The Commission determines:

1. The applicant suffered an injury to her right upper extremity (shoulder and arm) in the course of her employment with the respondent on 16 October 2017.
2. As a result of the injury referred in (1) above, the applicant was totally incapacitated for employment from 11 April 2019 to 26 April 2019.
3. At the time of the period of incapacity, the applicant's pre-injury average weekly earnings were \$2,186.07 per week.
4. The respondent is to pay the applicant weekly benefits pursuant to section 36 of the *Workers Compensation Act 1987* at the rate of \$2,077 per week for the period 11 April 2019 to 26 April 2019 (being 95% of the applicant's pre-injury average weekly earnings).
5. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses pursuant section 60 of the *Workers Compensation Act 1987*.

A brief statement is attached setting out the Commission's reasons for the determination.

Cameron Burge
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. On 16 October 2017, Melinda Sampson (the applicant) was working as an assistant principal with the Department of Education (the respondent) at the Public School. She became involved in an incident with a 6-year-old special needs student who required physical restraint.
2. At the time of the incident, there were three staff members in the room where the altercation with the student took place, namely the applicant and her colleagues BD and BE. The applicant said that in the course of restraining the child who was “violent, aggressive and has significant behavioural issues”, she sustained injury to her right shoulder and arm, the effects of which continued and worsened until she reported the problems with her shoulder on 19 December 2017. The applicant had previously reported the incident to a departmental report line on 17 October 2017.
3. On 2 April 2019, the respondent issued a section 78 notice declining liability on the basis the effects of any injury to the applicant’s right arm had passed and the mechanism of the injury was not as alleged by the applicant. The applicant then commenced these proceedings, seeking weekly benefits for the period 11 April 2019 to 26 April 2019 and the payment of medical and treatment expenses.

ISSUES FOR DETERMINATION

4. The parties agree that the issue in dispute is whether the applicant suffered injury to her right shoulder in the incident on 16 October 2017, and if so whether the effects of any injury suffered on that date had passed by April 2019.

PROCEDURE BEFORE THE COMMISSION

5. Despite the matter being of a very narrow compass, the parties were unable to resolve their differences. The matter therefore proceeded to hearing before me on 1 June 2020 via video conferencing.
6. On that occasion, Mr G Young of counsel instructed by Mr K Ho appeared for the applicant and Mr D Adhikary instructed by Ms B Dyson appeared for the respondent.

EVIDENCE

Documentary evidence

7. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (the Application) and attached documents;
 - (b) Reply and attached documents;
 - (c) the respondent’s Application to Admit Late Documents (AALD) dated 19 May 2020 and attached documents;
 - (d) the respondent’s second AALD dated 28 May 2020, and
 - (e) respondent’s Wages Schedule dated 19 May 2020.

Oral evidence

8. The applicant was cross-examined by the respondent at the hearing. BD also gave oral evidence and was cross-examined by the applicant's counsel.

FINDINGS AND REASONS

Injury

9. The applicant gave evidence broadly consistent with her statements. She attested to the truth of those documents, including the mechanism of the alleged injury to her right shoulder and arm. That included the child grabbing her arm, hanging from it and biting her.
10. A point of contention in the matter surrounded whether the child had tugged strongly on a bracelet the applicant was wearing. BD said this interaction did not take place, whilst the applicant was adamant that it had.
11. The applicant explained the child was attempting to get to the door of the room, which had an "old-fashioned, pull down handle" but the applicant was holding firmly to stop the door opening.
12. The applicant's version of the incident at issue was set out in her first statement found at page 1 of the Application. In that document, she stated:

"12. It was lunchtime and I was working away on some regular duties when I was very suddenly called by the school principal to assist with a control of a six-year-old special needs female student who was violent, aggressive and had significant behavioural issues. This student was known around the school community as one who would often try to escape school premises unattended.

13. The child then began to viciously attack three adults in the room, of which I was one of them. Before I knew it, the child was biting me with full force on my right forearm whilst scratching, punching, kicking and pulling me against my right wrist. I understand the sustained and strong pulling of my gold bracelet on my right wrist to have caused a traction injury there.

14. As I was visibly in pain and under attack the other adults focused their attention on removing the child from my right forearm. Once this was done, I attempted to secure the door of the room by holding the door handle in a hold position before the child suddenly locked her eyes onto me, ferociously pounced onto my arms until her entire body weight was dangling from my right arm, which in effect caused my body to tilt to one side and pull against my neck. I felt an extreme aching sensation in my neck and shoulder during this event.

15. Once the ordeal was over, the parents of this child were contacted. My right arm and shoulder were bruised, sore and incredibly weak. I applied ice over these areas.

16. I recall that I reported the injury to an injury hotline...within 48 hours of my injury. I told the hotline that I had injured my arm and even took photos. I strongly recall the reporting of my injury as the school principal had asked me to report my injury for the purposes of using these as evidence such that we could seek further school funding to assist with the management of the special needs' student. ...

17. Ever since the above date of injury, I have experienced constant niggling pain around my right shoulder, bruising around my arm and the feeling of constant aching in my neck."

13. The applicant stated that the pain, bruising and weakness in her right arm did not resolve. She stated she had reached the point where her right shoulder and arm pain was debilitating and she also felt extra pain in her anterior chest wall, for which she consulted her general practitioner Dr Moroney. When she initially consulted Dr Moroney in December 2017 about her chest pain, the applicant told him she thought she was having a heart attack.
14. The applicant underwent an x-ray and ultrasound on her right shoulder on 11 December 2017, as referred by Dr Moroney once he had excluded cardiac problems as the cause of the applicant's chest pains. The ultrasound revealed subacromial bursitis and long head biceps tendon tenosynovitis.
15. When asked by Mr Adhikary as to why she had not consulted with Dr Moroney between the date of injury and December 2017 concerning her right shoulder and arm problems, the applicant indicated that she had been managing the pain and swelling with Nurofen, however, it eventually reached a point where she could not manage it any further when she developed pain to the anterior wall of her chest.
16. The applicant was cross-examined in relation to not seeing a doctor in relation to her right shoulder until Dr Moroney himself suggested there must have been a traumatic event which led to her symptoms. The applicant admitted she saw Dr Moroney regarding chest pain primarily and that once a cardiac condition was ruled out, Dr Moroney then indicated to her the pain may have been caused by an injury and asked her whether she had been involved in any incident which might have caused her problems. She said it was at this point that she told Dr Moroney about the incident at issue, and he agreed the nature and extent of the pain she was experiencing was consistent with having been caused in that incident.
17. As noted, BD was present on the date of injury. She provided a statement dated 2 April 2019 and confirmed at the hearing its contents were true to the best of her knowledge and belief.
18. During cross-examination by Mr Young, BD indicated that she did not see certain aspects of the incident as they were allegedly recounted by the applicant. BD said she had a clear view of the incident; however, certain aspects of the applicant's account simply did not take place. Those aspects included the child having grabbed the applicant's arm and dragged down while hanging from it, grabbing the applicant's hand and tugging on her arm to try to get the applicant to open the door and grabbing and forcibly pulling on the applicant's bracelet.
19. BD conceded the third adult in the room during the incident, BE, is still employed at the Public School and had been continuously employed there since the incident at issue.
20. Mr Young suggested to BD that the student hung off the applicant's right arm and pulled violently on it. BD denied that this was the case, however, she agreed with the proposition that a portion of the altercation occurred when both the applicant and the child were trying to access the door handle, and the child was lashing out and striking the applicant while she was hanging onto the door.
21. Importantly, BD clarified that the incident report form was completed by a staff member of the respondent in a call centre, rather than being entered online by the applicant herself. That was consistent with the applicant's own explanation as to the form's content and provides, in my view, an adequate explanation as to why no mention was made of any shoulder injury in the report.
22. In terms of the nature of the altercation with the student and the physical forces involved in it, where there is a discrepancy between the evidence of the applicant and BD, I prefer that of the applicant. In my view, the person who best knows the physical forces being placed upon them by the student in the context of a protracted altercation is the applicant herself.

23. While it may be that BD provided an honest account of what she saw and perceived, in my view her evidence should not be preferred to that of the person involved in the altercation, and who has described the nature and extent of the actions of the student and what effect they had on her right upper extremity. I also note that the photographs of the applicant taken after the incident show a deep, red mark on her right forearm where her bracelet/ bangle had been in place. In my view, that is itself suggestive of significant force having been placed on the applicant's right arm and on the bracelet/ bangle by the student.
24. Mr Adhikary submitted that the applicant had in fact engaged in an exercise in working backwards from her appointment with Dr Moroney in search of a cause for her right shoulder symptoms, rather than actually attributing those symptoms to the relevant incident from the outset. I reject that submission and accept the evidence of the applicant that she was managing her right shoulder pain and discomfort for a time until the symptoms worsened to the point where she consulted Dr Moroney. When questioned by Dr Moroney as to whether she had suffered any traumatic incidents, the applicant recounted the altercation with the student, as it was the only incident which had taken place.
25. Moreover, I refer to the radiological evidence in this matter which demonstrated the presence of both bursitis and also a partial supraspinatus tear in the MRI of March 2018. That evidence, absent any other incident which might have caused the pathological change, is in my view suggestive of the altercation having caused the symptoms in the applicant's right upper extremity.
26. Moreover, I note the respondent did not provide a statement from BE, who was also in the room when the confrontation took place. Although Mr Adhikary submitted the respondent is not required to provide evidence from "confirmatory" witnesses, in circumstances such as this matter where two versions of events are provided by the applicant and BD, any evidence of BE would have been more than merely confirmatory. BE is a material witness who continues to be employed by the respondent. I do not accept the respondent was unaware of BE being a witness and find that her evidence would not have assisted the respondent had she been called to give evidence, in accordance with the authority in *Jones v Dunkel* (1959) 101 CLR 298 at 320.
27. However, even without drawing an inference pursuant to *Jones v Dunkel* against the respondent, I remain satisfied on the balance of probabilities that the applicant's version of events surrounding her physical struggle with the student is accurate, and I prefer it to that of BD for the reasons already stated.
28. Additionally, I find that improbable in circumstances where a violent struggle was taking place between the applicant and the student in which the latter was biting, scratching and hitting that the student nevertheless gently tugged on the applicant's arm in a reasonable and fairly weak manner. Such a version of events, as put forward by BD, is at odds with the balance of the altercation, in which it is apparent from both lay witnesses that there was an intense physical confrontation with a child who was out of control.
29. I also accept that there is no intervening event recorded between the incident at issue and the applicant undertaking medical treatment for her shoulder condition. It follows that the partial supraspinatus tear is, in my opinion, caused by the incident at issue and remained an ongoing problem for the applicant up to and including April of 2019.
30. I also accept the applicant's submission that she is a determined worker who continued with her duties to the best of her ability by using non-steroidal anti-inflammatory medication for a period of time until those symptoms got the better of her.
31. In so finding, I accept the opinion of the therapist Ms Vernon and that of Dr Ridhalgh, treating upper limb physician who received an accurate history. In his report dated 12 March 2018, Dr Ridhalgh provided the following history:

“She had an injury in October 2017 when a special needs student was pulling her right arm and hanging with the whole weight off her arm. She had bite marks on the arm at the time. She started to develop pain in her right upper limb and anterior chest wall radiating down the arm.”

32. On 31 May 2018, Dr Ridhalgh reported to the applicant’s GP Dr Ling in the following terms:

“Her MRI confirms a high-grade partial supraspinatus tear 8 x 5mm which is in the mid part of the supraspinatus and occupies more than 50% of the tendon width. There is further delamination of the tendon anteroposteriorly over the distance of 4mm. There is no muscle atrophy.

Melinda continues to be troubled by the right shoulder. She has trouble sleeping on the shoulder and has lost her confidence.”

33. Dr Ridhalgh provided further reports dated 2 July 2018, 30 July 2018, 27 August 2018, 17 December 2018 and 21 December 2018 at which times the applicant still had right shoulder and arm symptoms. In the report dated 21 December 2018 to the respondent’s insurer, Dr Ridhalgh said:

“1. Mrs Sampson sustained a traction injury on the arm. It was initially thought that she had a tear of her rotator cuff and it has been confirmed that she has a partial thickness tear of the supraspinatus tendon but she has gone onto neuralgic type pain which may have been related to a traction injury to her brachial plexus.

The diagnosis is rotator cuff injury with traction neuralgia of the brachial plexus which occurred on the 16 October 2017.

2. There is a direct relationship and causative relationship between the diagnosis I have provided and the incident that happened at work.

3. I did not see Mrs Sampson in the first two months since her injury rather I saw her approximately five months post injury and I was concerned at the time because of her symptoms that she was not a straightforward case of rotator cuff tendon tear although I was concerned that she had injury to her stabilisers of the shoulder...

4. I am unaware of any other factors or causes outside the incident that occurred at school that could have contributed to her condition, symptoms and diagnosis.”

34. As a treating doctor with the benefit of an accurate history of the circumstances of the injury at issue, I place substantial weight on the opinion of Dr Ridhalgh as to causation and the nature of the injury. Likewise, it is apparent from his sequence of reports that the applicant’s right shoulder symptoms did not rapidly resolve.

35. Dr Ridhalgh then referred the applicant to hand surgeon Dr Lawson, who provided a report dated 31 October 2018. In that document, Dr Lawson described the applicant’s problems as “unusual” and “hard to pin down.” Having taken into account the unusual nature of the symptoms and the nature of the injury at issue, Dr Lawson said “I think that the two must be correlated and I suspect that she has a form of neuritis.”

36. I reject the view of Dr Smith, Independent Medical Examiner (IME) for the respondent who indicated that if the applicant did not feel her symptoms within 24 hours of the incident, then they were not caused by it. The applicant’s evidence is that she did feel those symptoms, and I accept her in that regard. With respect to Dr Smith, there is no suggestion the applicant had a symptomatic right shoulder before the incident at issue, and her evidence, together with that of the treating medical experts, is that those symptoms have persisted.

37. Dr Smith's view that "there is no actual precipitating injury" which explains the applicant's injury stands in contrast with the mechanism recounted by the applicant to him, and does not adequately explain away that mechanism of injury, which the treating doctors accept has caused her ongoing problems. Likewise, Dr Smith says the applicant's right shoulder symptoms are attributable to degenerative changes in her cervical spine, a cause which the treating experts have discounted.
38. In relation to the lack of recording of the right upper extremity symptoms in the incident report form, I note the evidence of both BD and the applicant to the effect that document was generated by an employee of the respondent and not by the applicant herself. That being so, it is not in my view appropriate to make an adverse finding against the applicant as to the contents of a document which is not her own. Moreover, there is reference in the incident report generated by the call centre to the applicant using non-crisis intervention when "the student started to pull down her arm, also began scratched on her forearm." Those words are not, in my view, inconsistent with the mechanism of injury complained of by the applicant in her evidence provided to the Commission.
39. I reject the respondent's submissions that the evidence of BD should be preferred, and that there are unexplainable inconsistencies in the reporting to the medical practitioners by the applicant. Rather, I accept the applicant's evidence, finding her as a witness of truth, that she was managing her right shoulder symptoms for a period of some weeks after the incident at issue until such time as they worsened to the point where she had to consult Dr Moroney with anterior chest pain, and thereafter received a diagnosis of right upper extremity injury.
40. For the above reasons, I find that the applicant suffered an injury in the course of her employment to her right upper extremity with the respondent by way of right shoulder pathology on 16 October 2017, the effects of which continued at least up until the end of April 2019.

Capacity

41. Mr Adhikary submitted the applicant had at least partial capacity for employment for the period claimed. I reject that submission and accept the applicant's evidence that she had a total incapacity for the relevant 13-day period between 11 April 2019 to 26 April 2019. She was certified as unfit for that period by her treating general practitioner, and there is no evidence which directly contradicts that certification. I also accept the applicant's own evidence as to incapacity, given she continued working for some time after the injury through obvious pain and discomfort, and is a long-term employee of the respondent with a good work history. The fact the applicant was able to work for a period following the incident up to December 2017 and manage her pain using non-prescription medication does not, in my opinion, obviate from her having a later incapacity from work in April 2019.
42. I note the respondent has filed a wages schedule noting the applicant's preinjury average weekly earnings were \$2,186.07 per week. I accept that figure, coming as it does from the employer who has access to the wage figures. However, having found the applicant was totally incapacitated for employment for the period in question, I order the respondent to pay the applicant 95% of that figure for the period in question pursuant to section 36 of the 1987 Act, namely at the rate of \$2,077 per week.
43. In relation to medical expenses, I note neither party made substantive submissions in relation to the expenses claimed, and I therefore make a general order that the respondent pay the applicant's reasonably necessary medical expenses pursuant to section 60 of the 1987 Act.

SUMMARY

44. For the reasons advanced above, the commission will make orders as set out on page 1 of the Certificate of Determination.